

ANALYSIS OF ORIGINAL BILL

Franchise Tax Board

Author: Ackerman Analyst: Kristina E. North Bill Number: SB 1798

Related Bills: None Telephone: 845-6978 Introduced Date: February 22, 2002

Attorney: Patrick Kusiak Sponsor: _____

SUBJECT: Crime/Fine For Person Who Willfully Divulges Software

SUMMARY

This bill would conform the felony sentencing provisions for the disclosure or improper use of software to the determinate sentencing provisions in the Penal Code.

This bill also would make technical and nonsubstantive changes to other codes that do not affect the department and are not discussed in this analysis.

PURPOSE OF THE BILL

According to the author's office, this bill would correct an earlier drafting error made to the original felony sentencing provision. Nearly all non-life threatening sentencing provisions use the determinate sentencing provisions in the Penal Code.

EFFECTIVE/OPERATIVE DATE

This bill would be effective and operative January 1, 2003.

POSITION

Pending.

ANALYSIS

FEDERAL/STATE LAW

Current state tax law authorizes the Franchise Tax Board (FTB) to examine books, papers, records, or other data that may be relevant to an inquiry into the correctness of a state tax return. In addition, the FTB may issue subpoenas on certain third-party record keepers. FTB may issue a subpoena in a civil action for any portion of any third-party tax-related computer source code if specified requirements are satisfied. Specific protections are provided to prevent disclosure and improper use of trade secrets and other confidential information related to computer programs and source code in the possession of FTB as a result of the examination of a taxpayer. This provision does not apply to software acquired by or developed for internal use by FTB.

Board Position:

<input type="checkbox"/> S	<input type="checkbox"/> NA	<input type="checkbox"/> NP
<input type="checkbox"/> SA	<input type="checkbox"/> O	<input type="checkbox"/> NAR
<input type="checkbox"/> N	<input type="checkbox"/> OUA	<input checked="" type="checkbox"/> PENDING

Department Director

Date

Alan Hunter for GHG

04/12/02

A person who discloses software to any person not authorized in writing to analyze or otherwise have access to the software may be punished by 1) imprisonment in the county jail for up to one year, or 2) in the state prison for up to five years; 3) a fine of up to \$5,000; or 4) imprisonment and a fine, at the discretion of the court. The costs of investigation and prosecution may be included.

Current state tax law specifies that misdemeanor and felony charges may be filed in instances of criminal and willful violations of the state income or franchise tax laws. Some criminal actions, such as divulging or making known computer software, may be either a misdemeanor or a felony depending on the severity of the action.

At the discretion of the court, an individual who commits and is convicted of 1) a misdemeanor may be fined \$5,000 and/or sentenced for up to one year of imprisonment; and 2) a felony may be fined up to \$50,000 and/or sentenced for up to three years of imprisonment. Individuals convicted of misdemeanors or felonies also may be liable for costs of investigation and prosecution.

Under current state law, with the exception of life terms, California prison terms are generally specified in determinate terms. The determinate prison term for each crime is expressed as a "triad" of lower, middle, and upper terms. For example, a defendant convicted of a felony receives a term of imprisonment of 16 months, two years, or three years. A defendant generally receives imprisonment for the middle term unless factors in aggravation or mitigation indicate that he or she should receive the upper or lower term respectively. (Penal Code Sections 1170 and 1170.1.) Unless another sentence is specified, a defendant convicted of a felony receives the standard determinate sentence discussed above.

A prison term specifying an "up to" amount, such as "up to three years," is an indeterminate prison term sentence as confirmed by a recent appellate decision (*People v. Hagen* (2001) 88 Cal.App.4th 378.) Additionally the decision determined that a sentencing court could not impose imprisonment for less than the indeterminate sentence specified. Under current law, no provision exists for the Department of Corrections or the Board of Prison Terms to determine when a prisoner would be eligible for parole or a release date from prison for a non-life indeterminate sentence.

THIS BILL

This bill would require the determinate sentencing provisions in the Penal Code to be applied for an individual convicted of a felony for divulging software trade secrets that are in FTB's possession as part of a taxpayer audit.

IMPLEMENTATION CONSIDERATIONS

Implementing this bill would not significantly impact the department's programs and operations.

LEGISLATIVE HISTORY

SB 205 (McPherson, Stats. 2001, Ch. 854) conformed the sentencing for a felony in the tax law to the same Penal Code sentencing provisions used for essentially all other non-life threatening felonies.

SB 94 (Chesbro, Stats. 1999, Ch. 931), among other provisions, added false, fraudulent, or deceptive conduct in connection with offers in compromise to crimes subject to penalty to the Taxpayers' Bill of Rights.

OTHER STATES' INFORMATION

Due to similarities to California's tax laws and/or population, information is provided about *Florida*, *Illinois*, and *Massachusetts*' laws for sentencing provisions for felonies that are comparable to those that are the subject of this bill:

Florida - punishable by a term of imprisonment of up to five years, depending upon the crime.

Illinois - punishable by a term of imprisonment of between one and three years for the first offense and a term of imprisonment of between three and seven years for each subsequent offense.

Massachusetts - punishable by up to three years in prison and/or a fine of up to \$100,000.

FISCAL IMPACT

This bill would not significantly impact the department's costs.

ECONOMIC IMPACT

This bill would not impact the state's income tax revenue.

LEGISLATIVE STAFF CONTACT

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